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No. 82-1286

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

RUBY CLARK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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At pages 2-3 of Respondent's Brief in Opposition ("Brief in Opp."), respondent contends,

> If this case and *Schultz* v. *Newsweek*, supra [668 F.2d 911 (6th Cir. 1982)], in fact conflict on the interpretation of Michigan's qualified privilege, then *the* proper court for resolution of any such conflict is the Michigan Supreme Court by way of certified question. [Emphasis added]

This contention that American Broadcasting Companies, Inc. has applied to the inappropriate court is wrong for at least two reasons.

Although petitioner is a corporation, it has no parent companies, no subsidiaries other than those wholly owned by petitioner and no "affiliates" other than two individuals, Leonard H. Goldenson, Chairman of the Board, and Elton H. Rule, Vice-Chairman, who, by reason of their stock ownership in and management positions with petitioner, are treated by petitioner as its "affiliates" for purposes of compliance with the regulations promulgated under the Securities Act of 1933.

First, the Michigan certified question procedure may be invoked only where the question presented *is not* controlled by Michigan Supreme Court precedent. Michigan GCR 1963, 797.2(a) provides:

> When a federal court or state appellate court considers a question that Michigan law may resolve *and that is not controlled by Michigan Supreme Court precedent*, the court may on its own motion or that of an interested party certify the question to the Michigan Supreme Court. [Emphasis added]

In this instance, there is no substantive law question presented that is not controlled by Michigan Supreme Court precedent.

Second, while this Court has recognized the appropriateness of utilizing a certification procedure when faced with a novel question and a "great unsettlement" of state law, it has not suggested, even in those circumstances, that use of the procedure is mandatory. In *Lehman Brothers* v. *Schein*, 416 U.S. 386, 390-391 (1974), this Court noted:

> *We do not suggest that* where there is doubt as to local law and where the certification procedure is available, *resort to it is obligatory*. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court. [Emphasis added; footnote omitted]

Again, this case presents no question "that is not controlled by Michigan Supreme Court precedent," no novel question of unsettled state law. As summarized at page 17 of the Petition for a Writ of Certiorari, the Supreme Court of Michigan has long recognized the existence of a qualified privilege extending to every communication about matters of public interest and concern, without regard to whether or not the communication focuses on the plaintiff in question. The fact that the two-judge majority of the panel below has seen fit to disregard this controlling Michigan precedent that

the court in *Schultz* v. *Newsweek*, 668 F.2d 911 (6th Cir. 1982), recognized and applied in dealing with the Michigan qualified privilege, does not eradicate that precedent or create a "great unsettlement" of the Michigan law of qualified privilege that would justify resort to the certified question procedure.[1]

Petitioner therefore respectfully renews its request that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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[1] Even if this case did pose an unresolved question of Michigan law, there would be no assurance that an attempt to certify that question would have any result other than to delay further resolution of the issue, a delay during which the discussion in Michigan of matters of public interest and concern would continue to be chilled by the majority's truncation of the Michigan privilege. Although the Michigan Supreme Court has reviewed some questions certified by federal courts, it has also on more than one occasion declined review, prompting the Sixth Circuit to observe, in *Knox* v. *Eli Lilly and Co.*, 592 F.2d 317, 319 (6th Cir. 1979):

> This is not the first time our quetsions have been rebuffed by the Michigan Supreme Court, and we must frankly conclude that the promise of the certification procedure set out in Rule 797.2 appears to be illusory. . . . If our requests for assistance are to be denied, . . . the certification procedure is worse than useless, as it only further delays the lethargic movement of civil cases through the courts.